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**Towards a “narrow” path of recipients of criminal sanctions through the jurisprudence of the European Court of Human Rights**

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**Abstract:** The present paper aims to investigate, through the jurisprudence of the European Court of Human Rights, the nature of sanctions, starting from the Engel criteria, that are formulated during the years, forming different paths, therefore, their recipients continue to be always people who are convicted with various ways and crimes at domestic level. The paths are different for a common formal qualification regarding the erga omnes, since the sanctions as objectives are not the same for the relative justice. The dissenting opinions of the judges have laid the foundations to put our investigation to a much more in-depth path of a penal culture that behind every appearance judges sees the sanctions of each case with a way to itself.

**Keywords:** ECHR; ECtHR; criminal sanctions; domestic criminal law; erga omnes; objectives of sanctions, paradigms; restriction of recipients; double face of recipients; international criminal justice.

### **Objectives of the sanction in justice of the ECtHR**

The European Convention of Human Rights (ECHR) with its Court of Excellence, namely the European Court of Human Rights (ECtHR) has brought with its jurisprudence a broad culture in the criminal sector. This is a formal qualification that has attributed to the domestic legislator and to the illicit data, the sanction and the procedure as a substance that is interpreted by the articles of the ECHR with a way that is not so particular but consistent with the recognition of the same charter with an effective and precise way (Sudre, 2021; Rainey, Wicks, Ovey, 2021; Villiger, 2023)<sup>1</sup>.

The criteria of the nature of the offence and the severity of a sanction are considered in the criminal sector in a concrete way, to lead to a disciplinary referral measure, which can be classified as a deprivation of the relative freedom of its essentially criminal nature.

The nature of the sanction is based on the objectives to be pursued, especially with regard to general prevention and in

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<sup>1</sup>ECtHR, Engel and others v. The Netherlands of 8 June 1976. A and B v. Norway of 15 November 2016, par. 105.

light of the degree of severity, considering this perspective as a species of subsidiary nature where:

“(…) the general nature of the rule and the purpose of the sanction, both preventive and repressive, are sufficient to establish, in the light of art. 5 of the Convention, the criminal nature of the infringement (...)”<sup>2</sup>.

Thus, the qualification of the offence has been permitted on the level of domestic law where it has confirmed the relative and indicative value to the subjects. The criminal nature is recognized and the sub-criterion of the objective has gained progressive accentuation in the evolution of jurisprudence. The severity of the sanction is specified to decline from its merely patrimonial content as a dichotomy entrusted to multilateral assessment.

The ECtHR through the classic “Engel” ruling<sup>3</sup> has formally sanctioned what in substance has had a punitive character. States’ autonomy has delimited the concept of the criminal in one way only.

Domestic legislations have attributed to a measure of qualification in the criminal sector with a reciprocal manner<sup>4</sup>. Thus without an autonomous interpretation the states feel free to inflict sanctions that derogating in fact the guarantees of a conventional nature<sup>5</sup>. The protection of criminal law is made

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<sup>2</sup>ECtHR, Lütz v. Germany of 25 August 1987, par. 53.

<sup>3</sup>ECtHR, Khlaifia and others v. Italy of 15 December 2016, par. 80, which is affirmed that: “(...) not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty, and undertakes an autonomous assessment of the situation (...)”.

<sup>4</sup>ECtHR, Engel and others v. The Netherlands, op. cit., par. 80.

<sup>5</sup>ECtHR, G.I.E.M. S.R.L. and others v. Italy of 28 June 2018, par. 216.

effective according to the ECtHR:

“(...) remain free to go behind appearances” and make its own assessment if a certain measure falls (precisely) in substance to a penalty (...)”<sup>6</sup>.

In this way, a wide path of margins of discretion can be noted where the judge at each level can recognize a package of guarantees to the individual. Thus, the integration is presented as a substantial, tautological approach with a calm manner, which defines the formal character of the criminal law that corresponds to the crime, to the offence that is punished through the penalty. A penalty that is now the sanction of the crime and is realized by the ECtHR with a refinement of criteria that are clarified in the Engel ruling.

This considers as defined criteria<sup>7</sup>:

“(...) (i) the connection between the affirmation of (criminal) responsibility and the measure in question; (ii) the procedure that led to the provision; (iii) the character of the provision itself in domestic law; (iv) the nature and purpose; (v) the severity of the sanction (...)” (Sudre, 2021; Villiger, 2023).

The ECtHR has followed a test that is not so much autonomous but self-sufficient excluding the use of a cumulative approach, that is,:

“(...) separate analysis of each criterion [did] not make it possible to reach a clear conclusion as to the existence of a criminal charge (...)”<sup>8</sup>.

This is an introduction that implies the indices at the same level as a hierarchical basis. However, conventional jurisprudence includes criteria that have a greater weight. Thus, it is considered that the folds of the motivations are combinations of

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<sup>6</sup>ECtHR, *Welch v. United Kingdom* of 9 February 1995, par. 27.

<sup>7</sup>ECtHR, *Engel and others v. The Netherlands*, op. cit., par. 80.

<sup>8</sup>ECtHR, *A and B v. Norway*, op. cit., par. 105.

constant and dispositive arguments, that is, divergent ones that specify what it seems through the key words of the Convention jurisprudence on criminal matters.

In this way, a main basis is mentioned as a sub-test that is decisive for enunciations of equivalence, of autonomy that attributes to the absolute preeminence of relative indices.

The considerations of criminal jurisprudence are presented in an evident way where the criteria have value not only to please a criminal lawyer but also to give the same decisions an approach: of greater importance<sup>9</sup>, according to the gravity of the measure that is considered and not always decisive<sup>10</sup>.

The bases of ambiguous questionable solutions that also arise from dissenting opinions are often in conflict with the conclusions of the judgment and the Engel criteria.

They appear in criminal matters in a mixed way considering that the offense is punished with a sanction of a criminal nature and with disciplinary and post-criminal sanctions. Thus it is recognized that restrictions of personal freedom impose a criminal nature with guarantees where according to art. 5, 6 and 7 ECHR they are applicable to detention that is imposed by a criminal charge without a relative relevance of the circumstances where the court of a civil nature is competent.

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<sup>9</sup>ECtHR, *Engel and others v. The Netherlands*, op. cit., par. 80.

<sup>10</sup>ECtHR, *Welch v. United Kingdom* of 9 February 1995, par. 32. *Del Río Prada v. Spain* of 21 October 2013, par. 82.

Many times we have seen through the dissenting opinions of the judge Thór Vilhjálmsson the punitive character, that restricted the freedom of movement respecting what constitutes the evidence, that was not refutable with the same criminal nature and the relative ascertained measure.

According to the dissenting opinion of Judge Cremona “characteristics and exigencies of military life” have allowed to impose the penal nature of a relative punishment that implied with an indisputable manner the deprivation of liberty with an independent manner and according to its own duration. The nature of the punishment is considered as a temporal element, qualified in its own duration where the punishment comes into conflict with time and the implied prejudice of the deprivation of personal liberty is not qualified through a quantitative concept and certainly not appreciable.

Judge Verdross made a premise on the subject, underlining that detention in barracks and the incarceration of a soldier in a prison are similar situations with those of civilians, but this is not the case. Because a soldier convicted and segregated from his work environment, that is, from military life, breaks the spatial boundaries of the service at every moment that puts the performance of his duties in evolution and practice. This means that every form of disciplinary detention imposes on the military authority nuances that have nothing to do with the Court but

with the violation of art. 3 ECHR, that is, the imprisonment that its duration and severity comes into conflict with:

“(...) generally admitted by the Member States of the Council of Europe in the matter of disciplinary sanctions (...)”.

Judges O’Donoghue and Pedersen motivated the radical difference between the obligation of citizens, who obeyed the law and the special position of military personnel, who obeyed a disciplinary code stating the:

“(...) vital and integral constituent of the body of which they are members (...)”.

This meant, the discipline of an armed force, which as the judges reiterated, existed to an obligation that was precise, concrete and prescribed by law and on the members of the armed forces. Thus, the disciplinary offences are part of the military obligations as it is the domestic law that qualifies the crimes, which are not supported by relative guarantees and are based on art. 6 ECHR. This also means that the disciplinary offence remains on the path of a sanction, where the national law qualifies it as an offence in criminal matters and where the violation of a disciplinary nature is the substantial basis for finding a solution to the criminal dispute.

**What are the special statuses for disciplinary sanctions: restriction of recipients?**

Through the Engel case we have seen and found the basis of one way autonomy as a basis in criminal matters but also for specific

obligations that have known a relative vitality over time. We recall the “Örtzük” case that recognized in criminal matters a sanction of a derisory nature where the measure was not:

“(...) addressed to a special group of subjects, such as disciplinary rules (...) to all citizens as road users (...)”<sup>11</sup>.

The dissenting opinions express in a negative way the relative motivation of complementary statements. The subsequent decision *modus* is corresponded and affected conclusions in case the appeal has to do with common offences that are exclusive to the circle of recipients in a rigorous way.

The Engel criteria concerned criminal proceedings, regulated and applied to a general public. Thus, in the “Müller-Hartburg” case<sup>12</sup>, the “Disciplinary Act”, deals with members of a social group who have the status of lawyers without drawing conclusions that are different and that consider in the first place the sanction imposed, namely:

“(...) the severity of the penalty was not, of itself, such as to render the charges “criminal” in nature (...)”<sup>13</sup>.

Being struck off the professional register allowed the motivation of a fine that reached a high amount unlike the pecuniary penalties that led to the deprivation of personal liberty, namely in the event of non-compliance. Thus, the motivations of the decisions in the “Biagioli”<sup>14</sup> and “Brown”<sup>15</sup> cases overlapped. In

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11ECtHR, Öztürk v. Germany of 21 February 1984, par. 53.

12ECtHR, Müller-Hartburg v. Austria of 19 febbraio 2013.

13ECtHR, Brown v. United Kingdom of 24 November 1998.

14ECtHR, Biagioli v. San Marino of 13 September 2016.

15ECtHR, Brown v. United Kingdom of 26 October 2004.

these cases, the ECtHR did not take into consideration the criminal nature of a pecuniary penalty, since compliance could lead to the imposition of a custodial penalty with an assessment outcome that was up to the judge. The different modulations, were also linked to a different dispositive place of the appeal, where the reference to a circle of addressees that functioned as a sub-test disapplied Articles 6 and 7 recurring however in the judgments of the “Haarvig”<sup>16</sup>, “Storbråten”<sup>17</sup> and, “Rola”<sup>18</sup> cases.

We follow with another small group of appeals that were related to the economic infringements. These recognized the applicability of guarantees, where the measure was applicable and had an erga omnes character. We recall the “Bendenoun” case<sup>19</sup>, which was also reported in the “Örtzük” case. It has reported that “in the first place” the related tax infringement concerned all citizens of those, who contributed to specific groups and “with a particular status”<sup>20</sup>. In the “Jussila” case<sup>21</sup> we noted the relationship connected with the nature of the offence test, which was very important as we saw in the Janosevic case<sup>22</sup> and used again in the “A and B” case<sup>23</sup>.

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16ECtHR, Haarvig v. Norway of 11 December 2007.

17ECtHR, Storbråten v. Norway of 1st February 2007.

18ECtHR, Rola v. Slovenia of 4 June 2019.

19ECtHR, Bendenoun v. France of 24 February 1994.

20ECtHR, Bendenoun v. France, op. cit., par. 47.

21ECtHR, Jussila v. Finland of 23 November 2006.

22ECtHR, Janosevic v. Sweden of 3 July 2002.

23ECtHR, A and B v. Norway, op. cit., par. 32.

In particular, the ECtHR took into consideration the objection of the Finnish government regarding the applicant who did not respond to the relevant offence and was based on the provision that was applicable to taxpayers but accused of having violated the VAT rules, which concerned the application to all taxpayers and not only to “a limited group with a special status”.

The relevant objection was rejected by the judges of ECtHR since as they stated:

“(...) VAT registration for business purposes does not detract from this position (...) the VAT regulation does not introduce the applicant into a restricted circle of taxpayers (...)”.

It concluded the relevant measure, which characterised the compensatory function of a damage which had the punitive character and deterrence considering the sanction of a criminal nature with a more severe manner than that foreseen in the “Bendenoun” case<sup>24</sup>.

### **The double face of the recipients who follow the objectives of the ECHR**

With the Örtzük case and the Engel criteria we have noticed some contrapositions between the disciplinary norms that were

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<sup>24</sup>According to the dissenting opinion of judge in case Jussila which is affirmed that: “(...) there are criminal cases which do not carry any significant degree of stigma (...) self-evident that there are criminal cases which do not carry any significant degree of stigma (...) fall outside the hard core of criminal law and, ultimately, fall outside the full application of the guarantees of Article 6 (...) a “second class” offence, which only partially benefits from the status of the *volet pénal*, without fulfilling the task of delimiting the line of demarcation between “hard-core criminal law” and the rest of criminal law, which echoes the antiquated distinction between *mala in se* and *mala prohibita* (...)”.

reserved for the recipients, such as punitive measures that are sanctioned to an identification that tended the correspondence in the criminal matter, to the sanctions that were now universal subjects and that in a negative way excluded the penal character. The combination of double phase was taken into consideration by a quantitative element where the polarity of a dialectic of punitive measures and objectives according to the ECHR had to do with an evidence of two regularities of the appellants with coincidences.

On the one hand the infringement linked to a particular status without punishing the measures *erga omnes* and on the other hand the reservations of a limited circle of recipients that had a universal character consisting in the functioning of an objective that was different to the typical one of a penal sanction. As a conclusion, the *erga omnes* measures were the functional result of the preventive measures, where the ECtHR itself recognized the value of a test in criminal matters and which expressly correlated the subject of application used by the very nature test.

### **Recipients of non-punitive objectives**

Even in the legal profession sector, punitive objectives are connected with decorum, dignity, trust as we have seen in the “Müller-Hartburg”<sup>25</sup> and “Biagioli”<sup>26</sup> cases. In particular, in the

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<sup>25</sup>ECtHR, Moullet v. France of 13 September 2007.

<sup>26</sup>ECtHR, Biagioli v. San Marino, *op. cit.*, par. 55.

“Haarvig” case<sup>27</sup> we noted that the ban on practicing medicine did not have a criminal nature because the non-qualification did not have the objective of punishing the subject for an infringement but of preventing damages, thus compromising public trust and the reliability of practicing the profession.

In the “Storbråten”<sup>28</sup> case the ECtHR stated that:

“(...) the punitive character of the measure, by which the applicant had been disqualified from exercising senior roles in a joint-stock company, stating that the purpose of the disqualification was to protect shareholders, creditors and the company (as a whole) from the risk of losses and mismanagement which, in relation to a specific status, an irresponsible and dishonest person would be likely to generate if he continued to act under the umbrella of limited liability (...)”.

The restrictions which had as their destination precautionary objectives, that is, measures, were evident in the “Rola” case<sup>29</sup>.

In fact, in this case, the severity of the measure imposed was based on the margin, which had to do with the majority and which according to the dissenting opinion followed the criteria of the Engel case.

We noted, first of all, the dissenting opinions of judges Kjølbro and Ranzoni regarding the illegitimacy of a conventional nature insofar as it responds to the principle of art. 1 of the protocol n. 1 of the ECHR. Judges Pinto de Albuquerque, Bošnjak and Küris were against the majority opinion. Regarding the procedure that guided the provision and the connection for the

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<sup>27</sup>ECtHR, Haarvig v. Norway of 11 December 2007

<sup>28</sup>ECtHR, Storbråten v. Norway of 1st February 2007.

<sup>29</sup>ECtHR, Rola v. Slovenia, op. cit.

disqualification of the criminal sentence, the dissenting opinions argued the measures that imposed the automatic consequences of a conviction without examining, evaluating the additional way the professional reliability of the liquidator as provided by the law. We are talking about an inadequate way and of absolute presumption since judges Pinto de Albuquerque and Bošnjak stated that this “criterion speaks unequivocally for the penal nature of the measure”.

This is a conclusion with certain characteristics of a domestic law where the disqualification did not fall within the categories of sanctions of a penal code and did not exclude what was considered as legal consequence of conviction given that the old and new code included the revocation of the authorization to perform public functions and the right to practice professions where the penal codes excluded given the retroactive application of consequences that were accessory to the relative conviction. Thus we refer to a discipline that was expressive of fundamental principles of criminal law, namely the right to legality and, the prohibition of retroactivity that were established by art. 7 ECHR showing the objective of a provision where reliability was of the professional activity.

The disqualification did not have as its objective the punishment as an aggravating factor of the afflictive dimension of the penal sanction but only a severe measure that evaluated the duration of

the disqualification and the non-possibility of reacquiring it ex novo in addition obviously to the absence of the principle of proportionality. Thus the conclusion and the measure of the penal nature had as a consequence the application of retroactive law which in practice was illegitimate.

In particular, Mr Rola was convicted of violent behaviour in 2003 and 2004, at a time when the suspension of the sentence precluded the application of restrictive measures against the offender. Thus, even after the final sentence, Mr Rola revoked the licence required to continue the profession of liquidator in insolvency proceedings by applying a subsequent regulation for the *tempus commissi delicti*. The applicant relied on art. 7 ECHR and complained about the application of retroactivity which was not foreseeable in the period of commission of the offences under criminal law.

The ECtHR did not consider the criminal nature and the non-continuous qualification, as a consequence of a violation of the principle of non-retroactivity, where the reasons and objectives were not those of inflicting the punishment, which ensured public confidence as well as the profession of liquidator to proceed in the bankruptcy sector. Therefore, the relative revocation of the licence did not have a punitive nature. But it was decisive against the severity of the measure that did not place obstacles in the way of the author exercising another

profession in relation to the circumstance that led to the assessment and was different from the permanent nature of the sanction.

In the “Biagioli” case<sup>30</sup> the ECtHR accepted the disqualification which did not interfere with the assessment of a non-criminal nature according to the disciplinary measure which was not permanent given that the professional was rehabilitated by demonstrating that he had had a relative conduct characterised as irreproachable.

We have also seen the same path in the “Galan”<sup>31</sup> and “Miniscalco”<sup>32</sup> cases where the ECtHR affirmed an orientation that excluded the criminal nature of forms of restriction to the right to stand as a candidate as well as in the case where the measure constitutes a sanction of an accessory nature for a related crime<sup>33</sup> and which had nothing to do with the principle of non-retroactivity. This had not apply to the facts committed before the entry into force of the reference sources.

In this regard, the motivations were of a parallel nature and the connection approached references to a status that had to do with the objectives of the provisions. Thus, the recipients of the related measures read the electoral procedures and the related

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<sup>30</sup>ECtHR, Biagioli v. San Marino, op. cit., par. 56.

<sup>31</sup>ECtHR, Galan v. Italy of 18 May 2021.

<sup>32</sup>ECtHR, Miniscalco v. Italy of 17 June 2021.

<sup>33</sup>ECtHR, Rola v. Slovenia, op. cit., Paskas v. Lithuania of 6 January 2011. Estrosi v. France of 30 June 1995.

requirements that participated “in the votes” that were connected with the national authorities and recognized the criminal nature and the provisions of not being *ex novo* candidates.

The interaction between a narrow subjectivity of the provisions and the objectives of the sanction defined the profile of the derogation of a parameter where the one way autonomy was in reality an internal limit of a conventional concept in criminal matters.

The ECtHR highlighted that the measures did not have a punitive nature related to the function but identified within the scope of corruption policies a phenomenon that infiltrated organized crime connected with the freedom of decision, transparency and administration of elected assemblies, i.e. types of prescriptions of a rigorous nature in access to certain public offices, because of the ethics followed by the same institutions that were devoid of sanctioning functions and did not pass the test of severity that affected the right to passive rather than to active suffrage.

### **Erga omnes measures and objectives**

We have arrived at perhaps the most difficult topic that had to do with preventive measures of an *erga omnes* nature. According to the dissenting opinion of the judge “De

Tommaso”<sup>34</sup>, which had to do with personal prevention. In fact, he considered:

“(…) a poor contribution to counteract the incorrect labelling of reality (label fraud) of such measures, evading an in-depth analysis of the substantial characteristics, beyond the albeit cutting criticism of the poor quality of the law (paragraphs 9 and 25) (...) the ruling, in reality, does not seem to introduce any subversion of the direction briefly outlined in the previous pages (...) he rejected the criticisms relating to art. 7 and art. 6ECHR in his volet pénal (...) that special surveillance is not comparable to a criminal sanction, since the procedure leading to its application does not involve the assessment of a criminal charge (...)”.

The preventive character of a measure was like a shield of a qualification of a penal nature where the provision and its content were clearly repressive. The affirmation of illegitimacy had arrived at the issue of the nature of the measure. It was difficult that the general character of the type of provision was a measure that influenced the outcome that was different from the European judgment and that included conventional parameters of a different nature as we have seen in the Rola case. In it the final decision concerned the measure that responded to an illicit act to subjectivity of a rigorous nature.

Thus the blow was certainly hard for a discipline of personal preventive measures where even in a solitary way they introduced some points of opening towards preventive measures that were not far from the path that could be followed ab initio.

The motivation seemed to have confirmed an expository line of considerations that monitored the indeterminacy of

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<sup>34</sup>ECtHR, De Tommaso v. Italy of 23 February 2017.

identification criteria for the recipients to the extent that it did not guarantee the predictability of its effects. The reasons expressed the illegitimacy of delinquency in case the legal formula does not perform. The function of an authentic factuality identified the cases of a space of uncontrollable discretion and its relationship with a premise noted in the cases. “Rola”, “Haarvig” and “Storbråten” are viewed as bases that leads to a reconstruction of a decision with related assumptions that reached the conclusion of the judgment in question for the appeal that motivated the application of a measure that considered the subject as prone to crime.

This was an imprecise and indeterminate category that did not require the perimeter of a circle of assumptions, that applied to measures that followed prevention objectives. The circle of recipients for the related measures entered into the objectives of a preventive screen that also precluded other investigations that perhaps had nothing to do with the criminal circle.

### **Alternatives and shifts of the paradigm**

Criminal law is not free to do what it wants but has some limitations related to personal freedom as well as limitations of freedom that are identified with the punishment of a crime. Thus, in civil law countries the principle of criminal legality is in force as a label that is formed on a substantial level that

recognizes the criminal character of a sanction that in reality is not devoid of a nature that the extra-criminal punitive law was a penal sanction only. The one way autonomy has developed a relative paradigm that is connected with the mutations of measures where discretion has imposed on local legislators.

The precautionary formula takes into consideration an implicit risk of every approach of a schematic nature where through conventional jurisprudence it reduces the complex of variation between general and particular and that constitutes an essential of an international jurisdiction that is not so sufficient and articulated. It is inevitable that the investigations relating to the European review of the pilot sentences should not be overestimated with a minor way of manifestations that highlight the problematic nature that we encountered in the “Contrada” case<sup>35</sup>.

Thus a radical paradigm included within the ECtHR is lost from the case law that governs the local variables of the dramatic and sensational hypothesis of mutations, that is, of a physiological mutation. In this way, the problem of identifying an alternative path for the correct distortion of an eclipse of the paradigm in terms of either/or and with manifestations complementary to the hermeneutic process is not explored. Judges have often shaped the notion of criminal matter that renders satisfactory the

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<sup>35</sup>ECtHR, *Contrada v. Italy* of 14 April 2015.

different tests of a definition and the sub-criteria of a main index that we have seen in the Rola case and the dissenting opinion of the “De Tommaso” as a dialectic of a majority where the register were the Engel criteria that reflected the lines of complementary force to an asymmetric moment of the jurisprudence of the ECtHR.

The minority approach, we can say, was consolidated to a notion of criminal matter of double path of quantitative elements where in a sensitive way the evaluation of severity of a measure had a majority nature approach as a sort of delimiting the definition that behind the appearances is connected with a formal parameter based on considerations relative to the objective where in itself it has not been considered as reliable either by the jurisprudence of the past or by that of today<sup>36</sup>.

### **Towards a new criminal law of the convention**

Losing the paradigms that are part of criminal matters and within the scope of erga omnes measures means talking of a system of criminal law limited to offenses that the form of damage and the precise danger to cause legal assets are traditional including physical integrity, personal freedom and

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<sup>36</sup>ECtHR, *Ezeh v. United Kingdom* of 9 October 2003, par. 102, which is affirmed that: “(...) objectives not being mutually exclusive and being recognised as characteristic features of criminal penalties (...)”. *Blokhin v. Russia* of 14 November 2013, par. 102, is affirmed that: “(...) case-law criminal penalties have customarily been recognised as comprising the twin objectives of punishment and deterrence (...)”.

assets as settings that remain outside of criminal matters for the offenses of a rigorous subjectivity.

The non-severity of sanctions has an ambivalent path. The classic criminal law based on severity and measure has a negative character in itself as we have seen in the “Orztuk” case<sup>37</sup> but also a positive basis in criminal matters as we have seen in the Rola case where Engel's criteria were oriented towards non-afflictive sanctions and flowed into the system of crimes that escaped art. 6 and 7 of the convention with severe sanctions and with many penalties in a strict and rigorous sense. Extending criminal matters and punitive sanctions even in a modest way and behind appearances corresponds to an exclusion of crimes of a paradigm shift where a criminal system is outlined as a part of a hortus conclusus. Thus, the typical criminal and substantive law corresponds to a trend of punitive law of European origin within a conventional scope, where crimes are always of a pervasive nature to a punitive universe of an extra-penal dimension and remain outside the substantial path of an interaction between rigorous subjectivity and selective objectives. Times pass and Western democracies always ask for formal protection where freedom is placed within a constitutional matrix.

From what we have understood from the relevant jurisprudence,

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<sup>37</sup>ECtHR, Öztürk v. Germany, op. cit.

it is very difficult to move to a general codification that follows the first steps towards typological structures that put the Haupttatbestand in the forefront in relation to organised crime that risks polluting, as well as to divide into categories the historical context of a unified criminal law. Thus, the broadening of a perspective is connected with a dimension to a now classic criminal law of the past, of a sanctioning type where one reasons is based on guarantees of nullum crimen, on rules of fair trial to a climate now of Interventionsrecht that has to do with prevention, social defence that does not need guarantees but principles, categories of the strongest.

Social guarantees remain and do not conquer other regulated sectors in the enforcement path. The interaction between objectives and the emphasis that has been given to the function of selective criteria of a criminal nature are the tests for the seriousness and relevance of a crime. Thus, criticisms continue to be many.

On the one hand we have the relative considerations that have to do with the function of punishment and the ratio of protection. Thus the trade off is evident as we have seen in the “Galan” and “Miniscalco” cases where the statements of non-punitive objectives have to do with the provisions of ineligibility and, the forfeiture that responds to the ratio of a discourse relating to the function of punishment.

The anti-corruption policies as a phenomenon that infiltrates organized crime and the preservation of freedom of decision, of good performance, the transparency of the administration are objectives that are connected with punitive sanctions of a criminal nature, therefore, the sanctions of an extra-criminal nature are distinguished and referred to teleological elements. They are able to discriminate the nature of the measure as factors of severity of the sanction by adding that the non-punitive objectives from the jurisprudence of the ECtHR, which deals with a heterogeneous way to elements where the objectives are of a political-criminal nature of the offence to preventive objectives, are strictly speaking to the preventive measures that do not correspond to a conception, which concerns the objectives of the penalty.

The selection, distinction between criteria that inevitably prevail over sub-tests with precise ways such as for example the extension of erga omnes is a perspective that we have also noted in the A and B v. Norway case where Judge Pinto de Albuquerque stated that:

“(...) Court errors in equating criminal offences with norms of general personal scope. Quite surprisingly, it seems to ignore the long-standing European tradition of criminal offences with a limited personal scope, namely norms applicable to certain categories of citizens distinguishable by personal or professional features (Sonderdelikte or Pflichtendelikte) (...) criminal offences and norms of limited personal scope of applicability are not

mutually exclusive (...)”<sup>38</sup>.

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<sup>38</sup>ECtHR, A and B v. Norway, op. cit.

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